No. 09-710

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

MICHAEL PRESTON HALL,

Petitioner,

v.

CORINA NICOLE TENNISON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL L. MARSH
Counsel of Record
DANNA L. WOLFE
MARSH FROST & WOLFE
319 Atlanta Street, Suite 230
Marietta, Georgia 30060
770-528-0456

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether an exhaustive evidentiary hearing at which Petitioner appeared, represented by counsel, and presented testimony is sufficient to satisfy the requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

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STATEMENT OF THE CASE

This action involves Petitioner's efforts to legitimate his then three (3) year old child. Petitioner contends that just because he is the biological father of the child, he has a constitutional right to legitimate the child and that he was denied due process of law when the court denied his claim.

The facts surrounding Petitioner's Petition for Legitimation and the trial court's denial are set forth in the Court's Final Order. App. 6a-12a.[1] Notably, the Trial Court found:

Petitioner and [Respondent] did have a relationship which produced a son born on June 19, 2005. App. 7a. Though present at the birth of the child, Petitioner herein did not provide any financial support or medical care during Respondent's pregnancy or hospitalization for the birth of the minor child despite repeated requests by Respondent. App. 8a. Further, Petitioner did not provide medical insurance for the minor child subsequent to his birth despite repeated requests by Respondent forcing the child to obtain state provided health care insurance coverage. App. 9a.

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[1] The Petition contains a three-page discussion entitled "STATEMENT OF THE CASE, A. Background of the March 26, 2009 Order." Pet. 2-4. These factual assertions are not supported by citations to the record or the opinions below, and instead are Petitioner's version of the facts, which Respondent disputes.

Petitioner did occasionally visit with the minor child by either traveling to the child or the minor child and Respondent traveling to Petitioner's residence. App. 8a. In 2005, there were approximately seven days; in 2006, approximately fifteen days; in 2007 approximately fourteen days; and nine days in 2008 when Petitioner visited with the minor child. Upon the filing of the Petition for Step-Parent Adoption in August of 2008, Petitioner ceased contact with the minor child because it was awkward. App. 8a-9a.

Petitioner inconsistently paid child support for the minor child, and had sent the minor child a plastic batman car and the movie "Polar Express" as gifts. App. 9a. However, Petitioner insignificantly increased the amount of the support being paid because of his refusal to obtain health insurance for the minor child after his birth and after Respondent's repeated requests for funds to care for their minor child. *Id.* Despite constant requests by Respondent for the Petitioner to take appropriate legal action for the sake of his child, he only did so after Respondent's husband filed the Petition for Step-Parent Adoption. App. 10a. Implicit in the court's findings is the conclusion that Petitioner had no intention of legitimating the child until he was compelled by the pending adoption proceeding to take action.

REASONS FOR DENYING WRIT

Petitioner advances two flawed arguments. He argues that the trial court ruling conflicts with this Court's prior holdings on the issues of a) unwed fathers' constitutionally protected interests in their relationships with their biological children and b) the Georgia discretionary appeal statute violates his procedural due process rights. Pet. 6-14. Petitioner's arguments have no merit because neither argument was raised at the trial court level which is required by this Court's Rules, specifically Rule 14.

I. THE TRIAL COURT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT DECISIONS ON THE ISSUE OF UNWED FATHERS INTEREST IN THEIR RELATIONSHIP WITH THEIR BIOLOGICAL CHILDREN.

Petitioner cites four United States Supreme Court cases, all of which arose from legitimation matters filed in adoption cases and not singularly by legitimation cases. *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979); *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 177 L. Ed. 2d 614 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972). The Georgia Supreme Court in the case of *In re: Baby Girl Eason*, 257 Ga. 292, 358 S.E.2d 459 (1988), determined, by analyzing all four cases, that an unwed father possesses an opportunity interest to develop a relationship with his children

which is constitutionally protected. However, that opportunity can be lost if not timely and diligently pursued, an important element of the *Eason* holding ignored by Petitioner.

In Georgia, the standard of review to be used in a Petition for Legitimation is whether there is clear and convincing evidence that the biological father has abandoned his opportunity interest in the minor child. *In re: Baby Girl Eason*, 257 Ga. 292, 296 (358 S.E.2d 459) (1988). Petitioner erroneously states the holding of *Eason*. *Eason* holds that only if the Court finds that the father has NOT abandoned his opportunity interest does the Court's application of the parental fitness standard come into play. *Id.*

In the matter of *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) the United States Supreme Court clearly noted the "mere existence of a biological link does not merit equivalent constitutional protection." Further, *Caban*, as stated in *Eason*, that "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child . . . at that point it may be said that he acts as a father toward his children." *Id.*, at 389.

Finally, in *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 177 L. Ed. 2d 614 (1983), which was quoted in *Eason*, it was stated "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments

that derive from the intimacy of daily association, and from the role plays in 'promoting a way of life' through the instruction of children . . . as well as from the fact of blood relationship." *Id.,* at 295, 296. Until such time as a biological father marries the mother, or an order has been entered declaring a biological father to be the legal father of the minor child in question, the mother maintains all rights pertaining to the minor child. And while the biological father has an opportunity interest protected by due process, should the biological father be found to have abandoned his opportunity interest with regard to the minor child, the court has discretion to deny legitimation. *Eason, supra.*

Petitioner does not set forth any portion of the record to indicate the evidence presented was contrary to the holding in the trial court and therefore this Court has nothing to review and should deny the Petition.

Petitioner cites the case of *Binns v. Fairnot*, 292 Ga. App. 336 (2008), stating the trial court failed to consider the second prong of the legitimation inquiry to determine whether the father was fit to parent the child or whether granting the legitimation would be in the best interest of the child. Pet. 11.

Binns v. Fairnot is clearly distinguishable. In *Binns*, the financial support was "constant" and there was evidence the father had an "avowed interest in establishing and maintaining a relationship with the child . . . " *Id.* In the instant matter, the support was

sporadic as were the visits and the visits ceased in August 2008. App. 8a-9a.

Here, the trial court did fulfill the second prong of *Binns* and did establish that the legitimation is not in the minor child's best interest as articulated in its Final Order as well as determining that the biological father had lost his opportunity interest to develop a relationship with the minor child. App. 11a.

Further, Petitioner claims the decision by the Georgia Supreme Court to deny Petitioner's Application for Discretionary Review and subsequent Motion for Reconsideration violates their own mandate in *Binns*. Petitioner further claims that while doing so, the Court of Appeals also violated Petitioner's constitutional rights. Denying the Legitimation Petition does not impact a constitutional right of Petitioner as he was afforded due process in that he was heard on his Petition for Legitimation; he just did not like the result.

The trial court found there was clear and convincing evidence the Petitioner had lost his opportunity interest with respect to the minor child despite his sporadic visits and sporadic financial support to the minor child. The trial court further found there was clear and convincing evidence that if Petitioner were to step in and now assert rights and responsibilities abdicated by virtue of his own willful actions, it would irrefutably cause harm to the minor child, and that, therefore, legitimation is not in the best interest of the minor child.

II. THE GEORGIA STATUTE ON DISCRETIONARY APPELLATE REVIEW FOLLOWING A DENIAL OF LEGITIMATION PETITIONS DOES NOT VIOLATE UNWED FATHERS DUE PROCESS RIGHTS.

Petitioner did not receive the result he desired in the lower court. He was afforded due process by having a full and fair hearing at the trial court level. Said court did NOT terminate Petitioner's parental rights; it only denied his Petition for Legitimation.

Additionally, effective January 1, 2008, O.C.G.A. § 5-6-35(a)(12) now requires appeals from orders terminating parental rights be by application rather than a matter of direct appeal. *In the Interest of: A.C., a child,* No. S09A0931, Supreme Court of Georgia (2009). Therefore, Petitioner's argument that denial of his Petition for Legitimation is in effect a termination of his parental rights, allowing then a direct appeal, fails in that from 2008 going forward, appeals from terminations of parental rights are no longer afforded a direct appeal.

Georgia Appellate courts usually will not rule upon any constitutional challenge not raised and ruled on in the trial court. *In re: L.C.*, 273 Ga. 886, 888, 548 S.E.2d 335 (2001). Petitioner did not raise a constitutional challenge to O.C.G.A. § 5-6-35(a)(2) at the trial court level, therefore he cannot raise the issue now. Further, the Court, in *Dept. of Human Resources v. Phillips*, 268 Ga. 316, 320, 486 S.E.2d 851 (1997), stated "One cannot complain of a

judgment, order, or ruling [one's] own procedure or conduct procured or aided in causing, nor can [one] be heard to complain of a question on appeal a judgment which [one] invokes."

CONCLUSION

Petitioner was afforded due process at the trial court level and the trial court appropriately followed the law of the State of Georgia. There was no violation of Petitioner's Fourteenth or Fifteenth Amendment rights. Respondent respectfully requests this Court deny the Petition for Certiorari.

Respectfully submitted this 15th day of January, 2010.

MICHAEL L. MARSH
Counsel of Record
DANNA L. WOLFE
MARSH FROST & WOLFE
319 Atlanta Street, Suite 230
Marietta, Georgia 30060
770-528-0456

Attorneys for Respondent